UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA **v.** **CYNTHIA BALLENGER, and CHRISTOPHER PRICE,** **Defendants.**	**Case No. 1:21-cr-00719 (JEB)**

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO SUPRESS DATA RECOVERED FROM CERTAIN FACEBOOK ACCOUNTS AND DERIVATIVE EVIDENCE AND TO PROVIDE ANY OTHER APPROPRIATE RELIEF

ARGUMENT

I. The Prices Have A Reasonable Expectation of Privacy in Private Messages Under the Facebook Messenger Service, At Least, Which Provides Standing and Protection Under the Fourth Amendment

The Government appears prepared to ask this Court to make important Fourth Amendment law on thin reeds. The Prices' Memorandum of Points and Authority in Support of Defendants' Motion to Suppress Data Recovered from Certain Facebook Accounts and Derivative Evidence and To Provide Any Other Appropriate Relief. Memorandum of Points and Authorities Motion to Suppress ("Def. Mem. in Supp.") [ECF NO. 82-2] states that the focus is on the Facebook Messenger service and their private conversations on that service. There are broader Facebook privacy issues presented in the Search Warrant and in Def. Mem. in Supp., however, the Messenger service conversations alone and impact in the

instant case are a more than sufficient basis to give the Prices standing concerning their privacy rights and protection under the Fourth Amendment. The Government, for little reason, and with an invalid Search Warrant which provided for 2 years of surveillance (collection of two years of personal conversations) based on misdemeanor charges. The Government effectively looked for any conversation that mentions January 6th, views about the case, views about any of the cases, and views about political attitudes over an extensive time period.

The Government compels Facebook under penalty of law for the specific purpose of obtaining information on the Prices. This is not some voluntary agreement between the Prices and Facebook. If the Court believes any of the above needs an affidavit from the Prices regarding any critical fact pattern, the Prices would ask the Court to grant leave to file such an affidavit. The Prices have also specifically asked this Court for any appropriate relief.

Effectively, the Government argues that the Prices assume the risk that the Facebook would reveal the information in the Messenger service to the police because it is a private company and may access the messages for certain purposes. See Government's Opposition to Defendants' Motion to Suppress Facebook Data ("Gov't Opp." [ECF 85] at 14 -15. The Government reasons that Congress might provide statutory protection as set out in Govt' Opp. at 4-5. The government notes the Stored Communications Act (SCA) exists to create Fourth Amendment-like protections for electronic communications such as Facebook records. The Gov't Opp.

states with the SCA "Congress wanted to protect electronic communications that are configured to be private, such as email and private electronic bulletin boards." (Citing *Rep. of the Gam.*, 575 F. Supp. 3d at 14 (quoting *Konop v. Hawaiian Airline, Inc.*, 302 F. 3d 868, 875 (9th Cir. 2002)). The government argues, absent such Congressional action as the SCA the government argues there is no Fourth Amendment protection for their messages under the Messenger service.

The Prices note several points. First, the cases covering emails services (Def. Mem. In Supp. At 4) appear the most analogous to Facebook Messenger and apply the Fourth Amendment under their legal analysis. Second, even courts dealing with other parts of Facebook apply an analysis related to privacy settings. In *United States v. Meregildo*, 883 F. Supp. 2d 523 (S.D.N.Y. 2012) the court held that whether there is a Fourth Amendment violation depends on the user's privacy settings. When a social media user disseminates his postings to the public, the Fourth Amendment does not protect them. However, postings using more severe privacy settings reflect the user's intent to preserve information as private and may be Constitutionally protected. This analysis implements Fourth Amendment protections. Personal messages on Messenger must carry the most expectation of privacy. Third, the argument the Government advances also runs afoul of *Carpenter v. United States*, 138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018). *Carpenter* addressed cell phone location services. In *Carpenter,* the Government sought to compel disclosure under 18 U.S.C. § 2703. The Supreme Court overturned a Sixth Circuit and overrode logic like the Government now advances. Among other items,

Carpenter summarizes some basic points about the Courts view of reasonable expectations of privacy.

> In *Katz v. United States,* 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (1967), we established that "the Fourth Amendment protects people, not places," and expanded our conception of the Amendment to protect certain expectations of privacy as well. When an individual "seeks to preserve something as private," and his expectation of privacy is "one that society is prepared to recognize as reasonable," we have held that official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause. [Citing *Smith v. Maryland*, 442 U.S. 735, 99 S. Ct. 2577 (1979) internal quotation marks and alterations omitted).] *Carpenter,* 138 S. Ct. at 2213

Carpenter continues to discuss the importance of the Fourth Amendment to secure freedom:

> On this score, our cases have recognized some basic guideposts. First, that the Amendment seeks to secure "the privacies of life" against "arbitrary power." *Boyd v. United States,* 116 U.S. 616, 630, S S.Ct. 524, 29, L.E. 746 (1886). Second, and relatedly, that a central aim of the Framers was "to place obstacles in the way of a too permeating police surveillance." *United States v. Di Re,* 332 U.S. 581, 595, 68. S.Ct. 222, 92 L.Ed 210 (1948). *Carpenter,* 138 S. Ct. at 2214.

Carpenter discusses privacy in the whole of physical movement:

> A majority of this Court has already recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements. [Citing *United States v. Jones*, 565 U.S. 400, 430102 (2012) U.S. (ALITO, J., concurring in judgment); *id.,* at 415, (SOTOMAYOR, J., concurring). *Carpenter,* 138 S. Ct. at 2215.

It should not go without notice that several of the filtering criteria in the Search Warrant involved location. The Search Warrant Part B Section II(a) includes "Information that constitutes evidence of the identification or location of the user(s) of the Account. The Search Warrant Part B Section II (b) and (i) ask for persons who "communicated with the Account about matters related to the criminal activity under investigation, including records that help reveal their whereabouts." [ECF 83-2 at 9]

Carpenter dispenses with the third-party business argument the Government in the instant case proposes:

> ….the fact that the Government obtained the information from a third party does not overcome Carpenter's claim to Fourth Amendment protection. The Government's acquisition of the cell-site records was a search within the meaning of the Fourth Amendment. *Carpenter,* 138 S. Ct. at 2220.

Finally, the Prices note the SCA is intended to implement Fourth Amendment concepts, not replace or prove the non-application of the Fourth Amendment. The Fourth Amendment applies here by its own terms.

II. A Proper Fourth Amendment Analysis of Unreasonable Search and Seizure and Unreasonable Search Warrants Does Not Exclude Any of the Issues Raised by The Prices

The Fourth Amendment protects the Prices from unreasonable search and seizures. There is little governing the term "unreasonable." In the instant case, there are issues at multiple levels of the Search Warrant and process. The following diagram is intended to help understand the Prices' argument.

DIAGRAM OF CERTAIN SEARCH WARRANT STRUCTURE AND ISSUES IN THE INSTANT CASE

1) Agency Authority	• Statutes, Regulations as related to DOJ Manual
2) Representations In Search Warrant Application	• Authority • Scope Including 2703 and Particular Charges • Probable Cause And Alleged Facts
3) Search Warrant Authority	• 18 U.S.C. 2703 (a), (b)(1)(A) and (c)(1)(A) • Fed R. Crim. P 41
4) Limitations From Search Warrant Authority	• Scope Limitations Under 2703(a), (b)(1)(A), and (c)(1)(A) • Probable Cause & Material Relevance
5) Scope of Demand To Facebook	• Search Warrant Attachment B, Section I
6) Government Screening Criteria	• Search Warrant Part B, Section II
7) Limitations on Screening Criteria	• Scope Limitations Under 2703(a), (b)(1)(A), and (c)(1)(A) • Probable Cause and Material Relevance
8) Government Screenining Process	• Search Warrant Part B, Section III • Government Personnel • Government Interpretation

III. The Government Fails to Counter the Lack of Authority for the Facebook Search Warrant and Insufficient or Misstatements in the Search Warrant Affidavit When Analyzing the Fourth Amendment Prohibition or Other Appropriate Relief

The FBI must show authority to seek the search warrant regarding a given set of crimes or such application is illegal. As stated in Def. Mem. in Supp., the FBI does not have such authority, at least with respect to 18 U.S.C. § 2703.

In ¶ 2 of the Affidavit. Specifically, Special Agent Belcher claims authority to conduct investigations for offenses enumerated under 18 U.S.C § 2516. [ECF 82-3 at 13]. Neither offenses under 18 U.S.C. §1752 nor 40 U.S.C. § 5104 are offenses enumerated in 18 U.S.C § 2516. 18 USC §1751, on the other hand, is listed under 18 U.S.C § 2516.

The government's response to this is that, even if the Prices' position is correct the exception to the exclusionary rule under *United States v. Leon* would apply. Gov't Opp. at 16. The Prices have three responses. First, the Courts should address the issues of any exclusionary rule after reviewing all of the issues with the Search Warrant, not piece by piece. Second, the Prices addressed *Leon* in Def. Mem. In Supp. at 19-21, including that *Leon* is not apt. Third, the Prices argued that a broader Fourth Amendment balancing test applies. Under that test one asks with the harm for exclusion is significant relative to Fourth Amendment harm and impact in changing government practices. Fourth, to the extent Leon applies the exception would not apply under terms of Leon. Fifth, the Prices have asked for any other appropriate relief which can include declaratory action or calling for a hearing under the courts oversight power and obligations over Search Warrants. Here the

Prices raise the point that the statement of authority in the Search Warrant Affidavit was incomplete and inaccurate. The Prices also note that nothing the Search Warrant Affidavit states actually states there is FBI authority to investigate 40 U.S.C. § 5104 charges either. The Search Warrant should have been at least limited to not include 18 U.S.C § 1752 charges and the Secret Service should have been in charge of any investigation of that provision. The application was not authorized for the FBI to pursue 18 U.S.C § 1752 investigations. The terms of the search warrant included 18 U.S.C § 1752(a)(1) and (2) which is a broader scope than without 18 U.S.C § 1752. The screening criteria set out Special Agent Belcher cited to 18 U.S.C. § 1752 (a)(1) and (2) in the application and 18 U.S.C. § 1752 is cited in the search warrant.

Since the FBI lacks authority under 18 U.S.C § 1752, several things flow from this—it is not harmless. First, he lacked authority which is its own issue. Second, Special Agent Belcher has misstated the authority in the warrant application. Third, the scope of the warrant is now overly broad. Fourth, the screening criteria in the Search Warrant are overly broad because the screening criteria include criminal activity which is referred to as including 18 U.S.C § 1752.

IV. The Government Fails to Counter the Prices Argument Concerning the Scope Limitations Under the 18 U.S.C. § 2703, the Stated Authority for the Search Warrant

The Government cites to *Republic of Gam. v. Facebook, Inc.*, 575 F. Supp. 3d 8 (D.D.C. 2021). That case notes:

> the SCA "creates a set of Fourth Amendment-like protections by statute, regulating the relationship between government investigators and service providers in possession of users' private information." Orin S. Kerr, A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It, 72 Geo. Wash. L. Rev. 1208, 1212 (2004). It does so by limiting service providers' knowing disclosure of stored electronic communications, see 18 U.S.C. § 2702, and imposing procedural requirements on the Government's attempts to compel disclosure from these providers. See 18 U.S.C. § 2703.

Importantly, the analysis in *Republic of Gambia* concerns 18 U.S.C. § 2702 and not 18 U.S.C. § 2703 which is the authority for the Search Warrant in question. The Search Warrant ignores the scope limitations of 18 U.S.C. § 2703. The Government's analysis supports its "less protection without the SCA" concerns 18 U.S.C. § 2702 issues not issues related to 18 U.S.C. § 2703. Little in the Governments argument addresses the Prices points regarding the scope limitation of 18 U.S.C § 2703. The Search Warrant affidavit makes this statement concerning authority:

The governments only reference to these provisions concerning the content of messages:

> With the protections of the SCA in place, the Government in a case in federal court may only obtain such communication pursuant to a Rule 41 search warrant 18 U.S.C. § 2703(a).

18 U.S.C. § 2703(a) comes with an important scope limitation. That scope limitation is that 18 U.S.C. § 2703(a) only applies to "contents of a wire or electronic communication, that is electronic in an electronic communication system for one hundred and eighty days or less…" Compare this to the Search Warrant which covers "review of electronically stored information, communications, other records and information" The time frame in the Search Warrant is November 3, 2020 to the Present. The Present would be November 7, 2022 which is two years of contents and not just content under 18 U.S.C. § 2703(a) from the prior 180 days or less. Most, if not all, of the message conversations that the government received would not fall under 18 U.S.C. § 2703(a).

Def. Mem. in Supp. at 8-12 [ECF 82-2] made separate analyses of 18 U.S.C. §§ 2703(b)(1)(A) and (c)(1)(A). The main point is the Search Warrant ignores ANY and ALL of the scope limitations. The Search Warrant does not provide some different interpretations of the provisions. Instead, there is simply no attempt to acknowledge ANY 18 U.S.C. § 2703 scope limitations. The scope limitations of 18 U.S.C. § 2703 would either eliminate or greatly restrict the information the Government received including the contents of messages.

Since a valid search warrant under 18 U.S.C.§ 2703 must have scope limitations under 18 U.S.C. § 2703 there are multiple problems. First, the representation in the Search Warrant application is wrong. Second, the scope limitations must apply before the government receives the Facebook information. It

is feasible and required, for example, to state that the 180-day limitations under 18 U.S.C. § 2703(a) applies and limits what the government receives in the first instance. Certainly, by the screening criteria step, the scope limitation of 18 U.S.C. § 2703 must apply. The amount of material relevance that would attach to the remainder of what would be valid, if anything, would be substantially diminished.

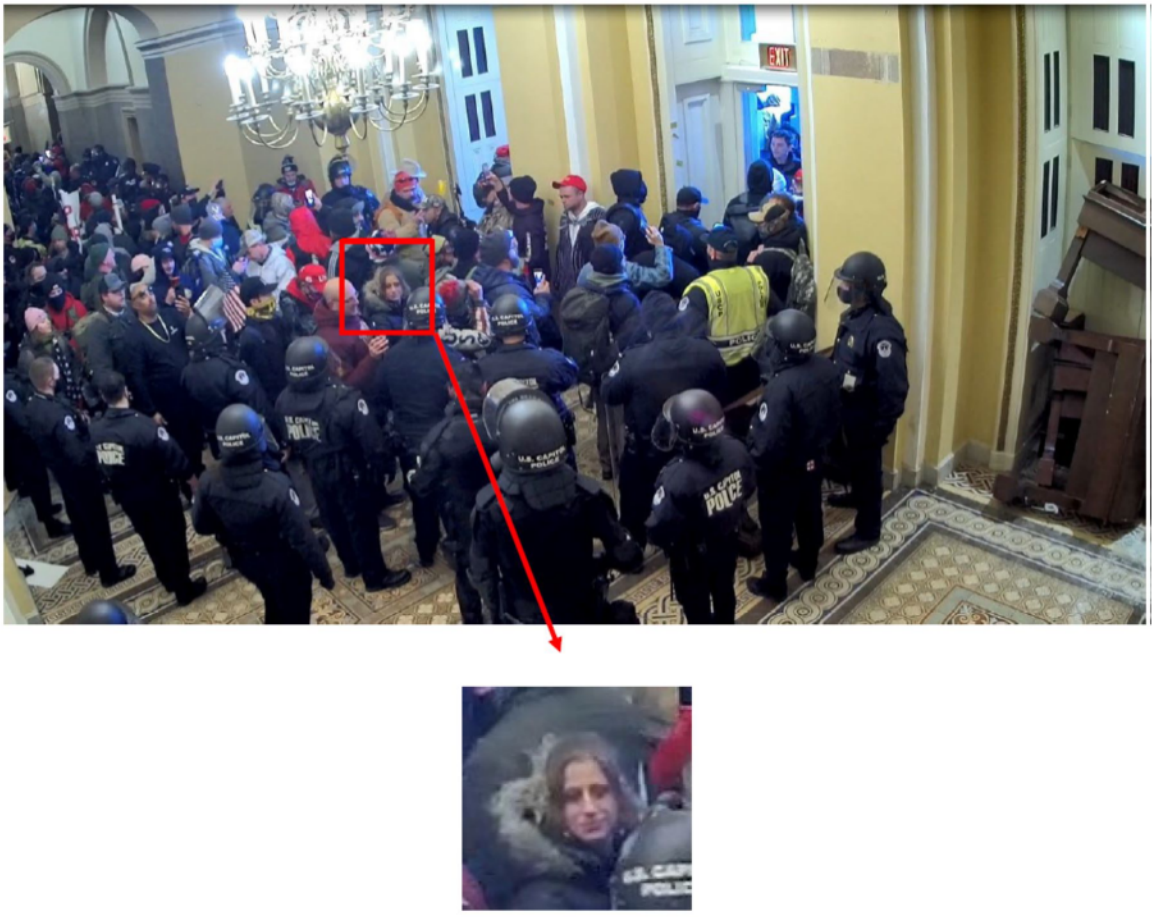
V. The Government Response Fails to Counter the Prices' Specific Argument Regarding Probable Cause and the Necessary Predicate Conduct: Disorderly or Disruptive Conduct or to Parade, Demonstrate or Picket Under Specific Charges

Defendants' argument regarding probable cause goes to the probable cause statement related to specific criminal charges. Defendants argument need not address whether the Search Warrant would provide evidence of a crime in the abstract. As example, the Def. Mem. in Supp. at 17 states:

> For a crime under 40 USC §§ 5104(e)(2)(D) or (e)(2)(G) and the government lacks probable cause regarding the predicate conduct because the government has evidence the Prices are peacefully walking during their short time in part of the foyer inside the Senate Wing Door. No statement or thought from a Facebook conversation can change what one sees in terms of conduct in the Capitol.

The government's suggestion that the Prices, in this motion. are arguing about *mens rea* regarding probable cause is also misplaced. Gov't Opp. 8. Nothing in the Government response changes the closed-circuit video (or Capitol Closed-Circuit

Video) ("CCV") inside the Senate Wing Door. No information on *mens rea* will change the CCV inside the Senate Wing Door. The Government has never made a claim that the Prices were doing anything other than peacefully walking, texting and taking pictures. Nor can they. Here is an excerpted picture from paragraph ("¶") 46 of the Search Warrant Affidavit. It is the same picture as from ¶18 of the affidavit of Special Agent Belcher supporting the Complaint. [ECF-1 Attachment 1]



Special Agent Belcher had every obligation and opportunity to review the government video and may have. There is no allegation from Special Agent Belcher that the Prices did anything other than peacefully walk, text or take a picture.

There is no evidence that the trip in was other than short and that the Prices were very soon standing peacefully in a slower line to exit. This means Special Agent Belcher had no probable cause for a search related to 40 U.S.C §§ 5104(e)(2)(D) or (e)(2)(G) because there is no predicate conduct. Also, to the extent, the allegation is about disorderly or disruptive conduct in the foyer/hallway is not predicate conduct under 18 U.S.C. §1752(a)(2). The lack of predicate conduct was certain and there were no more relevant questions. Nothing will change the footage.

Without a government camera that can identify precisely that the Prices only peacefully walked, took pictures, and texted there may or may not be probable cause. However, Special Agent Belcher does not get to ignore clear evidence of the lack of predicate conduct and, nonetheless, make a probable cause finding that requires that predicate conduct.

A few points about the CCV footage. First, it covers the whole relevant time period, uninterrupted of the Prices walk in the foyer and small part of a hallway. While the image of people pictured can get smaller, the video footage covers the entire area of the Prices' walk in the foyer/hallway. There are no decisions by anyone to move the camera that may be the case with personal video. The camera has no agenda. The camera contains no external references to other individuals describing their own experience or focusing on certain aspects. The CCV camera does not engage in hyperbole or inappropriately mix concepts together. The camera does not evaluate *mens rea*. The camera footage is the best evidence of the Prices physical and material conduct to the extent on that footage covers it. Such footage

is the best and most reliable evidence concerning the predicate conduct. Special Agent Belcher ignores the footage. Special Agent Belcher never tells the Magistrate Judge that that video covered the Prices and that the video evidence showed nothing more than the Prices peacefully walking, texting and taking pictures.

It is not enough to say these arguments are "trial defenses". Gov't Opp. at 8. The CCV evidence was available at the time of the application for the Search Warrant and findings of probable cause must include that evidence.

Several things flow from this. First, the application was missing critical facts from government video which Special Agent Belcher was fully aware. Second, the scope of the Application is overly broad. Third, the scope of the screening criteria is overly broad by referring to criminal activity to include 40 U.S.C §§ 5104(e)(2)(D) and (e)(2)(G).

VI. The Government Response Fails to Counter the Prices Argument Concerning Particularity, Overbreadth, And Excess Discretion in the Hands of Various Government Employees

The Prices do not argue that elements of the filtering criteria are all not sufficiently specific. The Prices pointed that a number of the filtering elements are not particular. The result ends up being all conversations about January 6th and more. Consider the Search Warrant Part B Section II(g) [ECF 82-3 at 10] includes conversations concerning "any riot and/or civil disorder at the United States Capitol on January 6, 2021." Here the Prices speculate, admittedly without firm bases, that there are billions and billions of conversations in email and messenger about this topic among people in the United in the relevant time period described. Admittedly,

there are not such a large about the Prices, but the specific statement does not seem limited. Regardless, there may or may not be some golden nugget of the opinion of the one of the Prices in a private conversation to mine that might shed light on something relevant. That is not enough under the Fourth Amendment. Consider the governments argument at Govt' Opp. at 9-10:

> …First, the defendants argue that information regarding their state of mind should be shielded because they have a right to talk about January 6. [Citing Def. Mem. in Supp. at 13] For this argument to be true, it would mean that all communication that all defendants have about their crimes would be unavailable to the government in the prosecution of those crimes.

The Prices have argued no such thing. The Prices do not argue a state of mind shield or exclusion. The Prices do not argue an exclusion that all communications that all defendants have about their crime would be unavailable. The Prices have argued the Search Warrant lacks particularity and is overbroad under the Fourth Amendment.

Note the government makes nor response that there is too much discretion to interpret the criteria from private conversations among an unknown number of government employees with unknown qualifications.

VII. The Court Must Not Fail to Address the Fourth Amendment Problems with the Search Warrant, Including by Granting the Motion to Suppress and Identifying the Issues So That Future Search Warrants Will Not Repeat These Failures

This reply does not fundamentally state more that Def. Mem. In Supp. on the government's argument that *Leon* is a get out jail free card for the all of the Fourth Amendment failures stated in the instant case. As a reminder, the Prices are under the threat of jail. The Prices were the subject of a search warrant covering 2 years of private conversations. The government, on the other hand, is under from pressure from the Prices instant motion for the government to do things legally and correctly. There is no suggestion in the Gov't Opp. that the government will change practice under any future search warrant. Again, the first, and important step the Court must do here is analyze and rule and the arguments the Prices have made through an opinion. The Prices have properly argued a substantial amount and variety of Fourth Amendment failures. If the court fails to provide such analysis, then further and continued harm will occur that erodes or overrides Fourth and First Amendment protections for the Prices and others. The motion to suppress should apply for all the reasons stated above and the Court should consider any other remedy at the Court's disposal. Such a remedy could include declaratory judgment or injunctive action, as an example.

The Courts have an obligation to protect against unreasonable searches under the Fourth and help protect the First Amendment. The exclusionary rule is one valid tool that can apply and the motion to suppress should be granted.

VIII. The Government Should Not State Unsupported Claims

The Prices had to devote a section in the Prices Reply [ECF- to false claims in a Government Response [ECF] Related to the Prices Motion to Dismiss [ECF Trial is close and the Prices fear the inappropriate presentation illustrated in the Government's Response Factual Background section in this recent filing.

A. The Claim the Prices Made Their Way Beyond Police Lines Is Unsupported

The Government states the Prices "made their way beyond police lines." The Prices are unaware of crossing a police line on the way to the Capitol Terrace. The Prices believe this statement is false and unsupported by evidence. This is a particularly sensitive point because the Prices sought discovery related to such claims to avoid surprise and to allow Counsel to prepare a proper defense. The Court issued a motion to compel on the point. According to the minute order:

> ….the Motion to Compel Discovery is largely DENIED with the exception regarding barriers, cordons, and restricted areas. So ORDERED, by Judge James E. Boasberg on 11/7/2022.

From the understanding of the Prices, this would include "…the status of any sign postings, bicycle racks, fencing, police cordons or other restrictions or public address announcements at the Capitol or Capitol grounds on January 6, 2021 including after the certification proceedings were halted that would in any way block or warn of restrictions from the grounds to the Senate Wing Door including the upper North

Terrace and Upper Terrace generally." Letter (1)(c). The Motion to Compel indicated:

> This request is tailored to the path Defendants took to get to the Senate Wing Door. It is directly relevant to whether there was a restricted area under 18 U.S.C § 1752 (c) and whether there was any notice to Defendants…. The ghost of the past perimeter is not the relevant legal issue. 18 © of the Affidavit of Special Agent Belcher [ECF 1 Attachment 1] claims the Prices were in a restricted area when there was no barrier or signs shown at that location. The request for discovery goes to impeachment of a claim of a restricted area. Nothing could be [more] fundamental. 69 17-18.

To the Prices understanding, the motion to compel with respect to restricted areas would also include "[t]he decision by any party to declare parts of the Capitol Grounds and Complex restricted (including identification of any such restricted area under purported authority of, and the elements or mechanisms by which any such restricted area would be set out) and any steps taken to communicate any such restrictions to the public…"

The Prices have not received this discovery. The government has an image of the Capitol Grounds that has a red perimeter drawn on it as a possible government exhibit. So far, the Prices are unaware of an author for this diagram or whether anyone has personal knowledge of how a perimeter was set out in the material world. There is no time frame for this diagram. There is no explanation of what elements comprise the diagram. It is clear to the Prices this diagram did not reflect

the material world after the certification process was suspended. Again, the Government alludes to the ghost of a perimeter and provides no evidence of what was there at the time of the Prices' walk. If there is a claim, the Prices need the alleged evidence.

B. The Government Claims a Specific Social Media Posting Without Basis

The Government Response also claims that Cynthia Ballenger (Price) took to social media and posted "We stormed the capitol" and "We totally owned it." Based on the exhibits provided to the Defense and Cynthia Price's understanding, this is false. Cynthia assumes the Gov't Opp. is referring to Facebook posts. Cynthia does not recall any other social media and does not recall any such posting to Facebook. These statements are not in the Affidavit ECF-1 and the Government is, without basis, claiming this for the first time.

Conclusion

For the reasons set forth above, and for such other reasons as this Court may determine, the Prices respectfully requests that this Motion to Suppress be granted and the court consider any other appropriate relief to be granted.

Dated: February 22, 2023

Respectfully submitted,

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